SUPREME COURT, U. S.

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FILED
AUG 6 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 246

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,
Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, ET AL., AND ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE DONNELLEY-WARREN PRINTING COMPANY, CHICAGO 56

SUBJECT INDEX.

	PAGE
Questions Presented	1
Statement of the Case	2
Reasons for Denying the Writ	2
Argument	4
Bargainability of Noncontributory Pensions	4
Asserted Threat to Strike for Retired Persons	9
Asserted Attempt to Strike During Mediation	10
Asserted Question Regarding Attorneys' Fees	11
Conclusion	13

Table of Authorities.

Cases.

Inland Steel Co. v. N. L. R. B., 7th Cir., 170 F. 2d 247, Cert. denied, 336 U. S. 960 (1948) 3, 8

International Ladies' Garment Workers' Union v. Donnelly Garment Co., 8th Cir., 147 F. 2d 246, Cert. denied 325 U. S. 852 (1945) 4, 13

McMullans v. Kansas, Oklahoma and Gulf Railway Co., 10th Cir., 229 F. 2d 50 (1956) 3, 9

Order of Railroad Telegraphers v. Chicago and Northwestern R. Co., 362 U. S. 330 (1960) 3, 6, 7, 8

Rudolph v. United States, decided June 18, 1962, Advance Reports No. 5, 8 L. ed. 2d 484 ..... 3, 10

Statutes and Rules.

Interstate Commerce Act, 49 U. S. C. §§ 1-27 6
National Labor Relations Act, 29 U. S. C. § 158(d) ... 8
The Norris-LaGuardia Act, 29 U. S. C. § 107 ..... 11, 13
Railway Labor Act
45 U. S. C. § 152 9
45 U. S. C. § 156 ..... 4, 9
Supreme Court Rule 23-1(c) 1, 4
Rule 23 (e) 2
F. R. C. P., Rule 52(a) 10

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QUESTIONS PRESENTED.

The above named respondents will hereinafter be called "respondents". Of the six questions which petitioner states are involved here (Petn. 2-3), respondents consider that the first is the only one squarely presented, and that it should be stated, in the terms and circumstances of this case as required by this Court's Rule 23-1(c), as follows:

1. Whether the request of railroad employees for an agreement with the carrier providing a new non-

contributory pension plan in substitution for an expiring plan which had previously been negotiated through collective bargaining presents an issue which is subject to mandatory collective bargaining under the Railway Labor Act.

Respondents will hereinafter state their reasons for believing that the other five questions stated in the petition are not properly presented here.

STATEMENT OF THE CASE.

Petitioner's statement of the case (Petn. 3-4) does not contain a description of the underlying dispute or the manner in which this dispute arose. At the beginning of the Argument section of this brief, respondents will summarize such facts on this subject as they deem essential to a consideration of the question presented regarding bargainability of pension plans.

Petitioner's statement of the case contains no reference, as required by Rule 23-1(e) of this Court, to *any* facts relative to the other questions sought to be presented, namely, a threatened strike for retired persons (Question 2), the status of the Mediation Board in this dispute (Questions 3-5), or the allowance of attorneys' fees (Question 6). Respondents will make brief reference to such facts under paragraphs 2-6 of following Section of this brief entitled "Reasons for Denying the Writ."

REASONS FOR DENYING THE WRIT.

Respondents here state briefly their answers to petitioner's declared reasons for granting certiorari (Petn. 4-5), following the order of the "Questions Presented" as they appear in the petition, pages 2-3:

1. Although this Court has not decided the precise issue presented here concerning bargainability of a proposed

new pension plan, the scope of mandatory collective bargaining under the Railway Labor Act has been fully considered in connection with a case in which a far more difficult question as to bargainability was presented. *Order of Railroad Telegraphers* v. *Chicago and Northwestern R. Co.*, 362 U. S. 330 (1960). The dispute in that case was held bargainable, and the rationale of that decision leads to the conclusion, *a fortiorari*, that pension plans such as those involved here are bargainable. Decisions by courts of appeals dealing with similar questions are uniform in favor of bargainability. *Inland Steel Co.* v. *N. L. R. B.*, 7th Cir., 170 F. 2d 247, Cert. denied, 336 U. S. 960 (1948). *McMullans* v. *Kansas, Oklahoma and Gulf Railway Co.*, 10th Cir., 229 F. 2d 50 (1956). The question presented is not of such importance that review here is needed.

2. The question whether employees may threaten to strike for increased pensions for retired persons is not properly presented because this case on its facts, as found by the District Court, did not involve that issue. The District Court found that no such threat was made (Petn. A-16, App. 457). Certiorari to review this question is subject to the "clearly erroneous" rule: *Rudolph* v. *United States*, decided June 18, 1962, Advance Reports No. 5, 8 L. ed. 2d 484, at 486.

3-5. The questions sought to be raised concerning the legal position of the National Mediation Board in relation to the dispute involved in this case are not properly raised here because of the District Court's findings and conclusions (App. 458-461) that the Mediation Board formally terminated its services before the strike date was set and that mediation under the Railway Labor Act was not thereafter resumed. These questions sought to be presented are, at most, mixed questions of law and fact and are governed by the "clearly erroneous" rule referred to in the preceding paragraph, and in view of the District Court's findings, are largely academic.

6. The question sought to be raised concerning allowance of attorneys' fees is not properly presented here, and no conflict has been shown between the holding here and that in *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 8th Cir., 147 F. 2d 246, Cert. denied 325 U. S. 852 (1945). The point petitioner seeks to make is based on the terms and conditions of the injunction bond, but such terms and conditions do not appear in the record brought here. The decision in the *Donnelly* case is based on the fact that the trial court did not consider Norris-LaGuardia applicable and did not require a bond in accordance with Section 7 of the Act. That is not the case presented here.

ARGUMENT.

Bargainability of Non-contributory Pensions.

This question must be considered in the context of its factual origin, "in the terms and circumstances" of this case (Rule 23-1(c)). The pension plan dispute involved here grew out of the unions' request, dated October 1, 1959, for a more liberal plan to replace one which had resulted from a collective bargaining agreement made July 19, 1957. This agreement, which had followed an earlier agreement, also collectively bargained (App. 454), provided that it would be effective "until October 31, 1959, and thereafter until changed or modified in accordance with the provisions of the Railway Labor Act, as amended" (App. 345). This agreement shows on its face that it was the result of successful mediation under the aegis of the National Mediation Board (App. 344-346).

The unions' request for an improved plan was made by notices (App. 10-11) purporting to be Railway Labor Act "Section 6 notices" (45 U. S. C. § 156). The issue was

discussed at two conferences during October, 1959 with management, and the carrier then formally declined the request and made certain counter-offers (App. 383-384). Efforts during the following eighteen months to settle the matter through negotiation and mediation failed, and a strike was set for May 20, 1961 (App. 11-16).

The above events are simply a part of the factual background of the dispute involved in this case, and as such, they are necessarily bound up in the question presented as to the bargainability of the pension issue. The employees have understandably believed that any question about the bargainability of it was settled in 1957 on this railroad, *i.e.*, that the parties have allowed the collective bargaining process to define its own scope in a manner which includes the field of pensions. Therefore, whereas petitioner contends that the Court of Appeals' decision, for the first time in the railroad industry, extends mandatory bargaining to pensions (Petn. 4), it appears to respondents that this extension actually occurred, at least on this railroad, some five years before the decision in question.

Nevertheless, the question whether pension plans are bargainable in the railroad industry generally is indeed an important one. This is so whether pensions continue to be called "fringe benefits" (Petn. 4), or whether they are eventually described in terms more in keeping with their value in the minds of railroad employees of today. The decisions of the District Court and the Court of Appeals on the question presented here are of great importance to the employees of this railroad. A "grand amen" by this Court would obviously be of even greater importance to them.

Even so, respondents cannot agree with petitioner that this case presents a question of such general importance that it ought to be decided by this Court. This is because the status of the case law which is pertinent to this ques-

tion, including a recent decision by this Court, makes a review at this time unnecessary.

In *Order of Railroad Telegraphers* v. *Chicago and Northwestern R. Co.*, 362 U. S. 330 (1960), the scope of mandatory collective bargaining under the Railway Labor Act was directly involved. The dispute there was over a union request for a contract change which would require union consent before the carrier could abolish certain jobs. At the outset of the dispute the carrier took the position that this issue was non-bargainable because it had an unlawful object, *i.e.*, an improper invasion into the field of management functions in the operation of the railroad, and was an attempt to interfere with Interstate Commerce Commission duties under the Interstate Commerce Act (49 U. S. C. §§ 1-27). The Court rejected these contentions and held that the dispute presented a bargainable issue under the Railway Labor Act. The Court said (362 U. S. at 338):

> "In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large."

To apply the reasoning in *Telegraphers* to the instant case, respondents submit that retirement pension plans such as those here involved (App. 409-439), providing payments based on average earnings, years of service and attained age, are so obviously a form of deferred compensation for work done that the point need not be labored. If the Railway Labor Act phrase "rates of pay, rules, or

working conditions" does not cover this subject, a radically different interpretive approach to the question will have to be used than that adopted in *Telegraphers*.

Moreover, the reference in the above to "the practices and customs of the railroads and their employees themselves" has particular significance as applied to the practice established between the EJ & E railroad and its employees in 1957 of treating pensions as bargainable. Petitioner stresses the fact that as of 1957, a great majority of the larger railroads in this country with pension plans had established them without collective bargaining (Petn. 8-9). Respondents submit that this cannot under any conceivable theory put the pension agreement which was collectively bargained on the EJ & E railroad in 1957 under suspicion of having an unlawful object, or leave any doubt that the parties considered the field one in which they shared mutual responsibility for handling through Railway Labor Act procedures.

In the *Telegraphers* case, four members of the Court dissented on the question of bargainability, chiefly on the ground that they considered the union demand for unilateral veto power over abolishment of jobs was unlawful under the Interstate Commerce Act. The dissenting opinion of Mr. Justice Whittaker, with whom Justices Frankfurter, Clark and Stewart joined, made this clear as follows:

362 U. S. at 357:

> "* * * It is not to be doubted that a carrier and a labor union representing the carrier's employees, lawfully may bargain about and agree upon matters in mitigation of hardships to employees who are displaced by railroad unifications or abandonments; but they may not agree, nor may any regulatory body order, that no jobs shall be abolished, and thus defeat unifications or abandonments required in the public interest. * * *"

362 U. S. at 359-360:

> "• • • Here, as has been shown, the Union's demand was in derogation of the provisions and policies of the Interstate Commerce Act. It could not therefore be a lawfully bargainable subject within the purview of § 2, First, of the Railway Labor Act. The carrier could not lawfully accept it, and hence a strike to force its acceptance would be one to force a violation of the law."

Again comparing *Telegraphers* to this case, it is apparent that the difficult questions of overlapping fields of interest, which in *Telegraphers* included the field of employee interests in job security as opposed to the field of management prerogatives and the field of Interstate Commerce Commission jurisdiction, are not presented in the instant case. The question of changing or not changing a pension plan has no significant element of interference with management's control of railroad operations, and involves no possible interference with the duties of the Interstate Commerce Commission. It follows that the factors which divided the Court in *Telegraphers* are not present here. That case provides a definition of the scope of mandatory bargaining under the Railway Labor Act which is clearly broad enough to make review in the instant case unnecessary.

The subject of pension plans was held bargainable under the National Labor Relation Act in the case of *Inland Steel Co.* v. *N. L. R. B.*, 7th Cir., 170 F. 2d 247 (1948). This Court denied certiorari on the issue of bargainability of pensions (336 U. S. 960), although it did grant the writ on a separate constitutional question (339 U. S. 382, 386-387). Petitioner does not challenge the correctness of the *Inland* decision, but would make a distinction, as applied to the bargainability of pension plans, between the N. L. R. A. phrase "wages, hours and other terms and conditions of employment" (29 U. S. C. § 158(d)) and the Railway

Labor Act phrase "rates of pay, rules, or working conditions" (45 U. S. C. § 152). The variance in these two phrases was not considered sufficient, in the opinion of the Court of Appeals in this case, to justify a different holding as to bargainability (Petn. A-6).

The same result was reached by the Tenth Circuit in a case involving a contract provision for compulsory retirement. *McMullans* v. *Kansas, Oklahoma and Gulf Railway Co.*, 10th Cir., 229 F. 2d 50 (1956). It is clear that the decision in the instant case does not conflict with these other Court of Appeals decisions, and that it is completely consistent with this Court's views as expressed in *Telegraphers*.

Asserted Threat to Strike for Retired Persons.

Petitioner asserts that the "question of the right to strike for retired persons" is presented here (Petn. 2, 4), and petitioner devotes several pages of its argument to this subject (Petn. 12-19).

At the threshold of this problem lies an obstacle much too large to be put in a brief footnote, as petitioner has done (Petn. 17, footnote 8). This is the finding of the District Court on the point, which is as follows (App. 457):

> "During the collective bargaining conferences officers of the BRT, ORCB, and BLFE urged the plaintiff to restore or to increase benefits theretofore paid or being paid to employees of the plaintiff who had retired from the service of the plaintiff prior to the expiration of [an H-B on October 31, 1959, but such discussions were not treated by the officers of the defendant labor organizations as collective bargaining under the Railway Labor Act. Neither the Section 6 Notices served by the labor organizations nor the strike ballots taken by them referred to retired employees. Officers of the BRT, ORCB, and BLFE never at any time threatened to strike against the plaintiff on account of the position of such retired employees."

The Court of Appeals, referring to the above finding, stated in its opinion (Petn. A-6):

> "In the absence of a showing that such Findings of Fact were clearly erroneous (Rule 52(a), F. R. C. P.), this Court is bound by them and the issue of the lawfulness of a strike to obtain increased pension benefits for retired employees is, in fact, a moot question."

Respondents submit that the application for certiorari to review this question is governed by the "clearly erroneous rule." *Rudolph* v. *United States*, decided June 18, 1962, Advance Reports No. 5, 8 L. ed. 2d 484, at 486.

Asserted Attempt to Strike During Mediation.

Respondents cannot agree that any of the three questions put by petitioner (Petn. 2, Questions 3-5) regarding the National Mediation Board's role in this dispute are actually presented here. Each of these questions presupposes that the planned strike was set to take place during the Board's mediation processes under the Railway Labor Act. The District Court found otherwise (App. 457-460), and concluded that the parties had "exhausted all administrative remedies to prevent the threatened strike" (App. 461). It seems unnecessary to review here the detailed findings (App. 457-460) regarding the formal termination of mediation by the Board, or the subsequent resumption of bargaining by the parties with the aid of a mediator, or the evidence on which these findings are based, from all of which the District Court held that mediatory services under the Railway Labor Act had been terminated on March 16, 1961 and were not thereafter resumed. The Court of Appeals affirmed this holding (Petn. A-4, 5).

Respondents submit that these questions, on petition for certiorari, are also governed by the "clearly erroneous rule". *Rudolph* v. *United States*, decided June 18, 1962, Advance Reports No. 5, 8 L. ed. 2d 484, at 486.

Asserted Question Regarding Attorneys' Fees.

Petitioner states this question as follows (Petn. 2-3):

> "Whether, *when the injunction bond is not conditioned to provide for attorneys' fees*, defendants in a labor injunction suit are entitled to recover attorneys' fees under the bond or Section 7 of the Norris-LaGuardia Act?" (Italics added.)

Petitioner's argument (Petn. 23) quotes authority for the proposition that the bond should be the evidence and measure of petitioner's liability and respondent's protection.

Petitioner's difficulty here is that after focusing attention on what it apparently considers the decisive element in this question, namely, the *provisions of the bond*, it fails to make any reference to this document as appearing in the Joint Appendix or elsewhere in the record. Nor is any record reference made to any other evidence which would show what the conditions of the bond actually are. Respondents cannot find the bond in the Joint Appendix.

It follows that petitioner's statement, standing alone, that the bond "is not conditioned to provide for attorneys' fees" (Petn. 2-3) is essentially a legal opinion based on undisclosed facts.

Surely the question sought to be presented here is not so simple that the answer depends on whether or not the phrase "attorneys' fees" appears in the text of the document. If the terms of the bond do not contain such a phrase, or other words of similar import, automatic application of the rule of *damnum absque injuria* urged by petitioner (Petn. 23) is not necessarily the only conclusion which could be reached.

For example, inasmuch as one who applies for an injunction seeks equitable relief, other principles of equity might be applicable in this situation, including those relating to reformation of written obligations based on mutual mis-

take. It may be that the bond needs amending to speak the truth as to the intention of the Court which ordered it given. The District Judge, during the hearing of June 22, 1961, made it clear what was in his mind at the time the original temporary restraining order bond of $5,000 was set (App. 261):

> "The Court: There was a small bond at that time, because I looked at it as covering attorneys' fees. I believe it was $5,000."

Whether the railroad also intended that the original bond cover attorneys' fees is not as clear, but the record does show that the above quoted statement by the District Judge was made in the presence of petitioner's counsel, who made no comment (App. 255, 261). The same may also be said of the hearing of June 21, 1961, when the wording of the Final Decree was being determined, including the provisions of paragraph 2 of the decree, as follows (App. 464):

> "2. The plaintiff shall recompense, and pay to, the defendants herein their loss, expense, or damage caused to the defendants by the issuance of the Temporary Restraining Order herein on May 19, 1961 including all reasonable costs (together with reasonable attorneys' fees) and expense of defense against the order and against the granting of injunctive relief sought in this proceeding and subsequently denied by this Court. For the purpose of determining the amount thereof, this Court reserves jurisdiction of this cause for this purpose only. Hearing thereon will be set upon motion when time for appeal has passed. If appeal is taken hearing will be set after final mandate herein."

The transcript of that hearing shows (App. 244, 252) that counsel for petitioner made no comment on the above quoted portion of the decree. The Joint Appendix does not include any transcript of the initial hearing of May 19, 1961, during which the original bond was directed to be given.

The Court of Appeals found no error in the District Court's decree covering attorneys' fees (Petn. A-9). The opinion indicates that the Court of Appeals considered Section 7 of the Norris-LaGuardia Act (Petn. B-2 to B-4) as controlling. Petitioner contends that this holding is in conflict with *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 8th Cir., 147 F. 2d 246, cert. denied, 325 U. S. 852 (1945). That case is not pertinent because the trial court there believed that Norris-LaGuardia was inapplicable, and did not intend to require a Norris-LaGuardia Act bond. The opinion states: "It is beyond question that the bonds in this case were not required by the court nor given by the plaintiff pursuant to the provisions of the Norris-LaGuardia Act" (147 F. 2d 246, at 253). Those circumstances obviously cannot be said to apply to the situation shown by the record here. No conflict has been shown.

With mixed feelings, we note finally that as to attorneys' fees, the petitioner makes no claim that the question is of any importance whatever.

CONCLUSION.

Respondents submit that the petition does not disclose any sufficient reason for granting certiorari, and that the writ should be denied.

Respectfully submitted,

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July 31, 1962.